

NEWS

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

(202) 755-4846



REMARKS TO THE
NEW YORK REGIONAL GROUP
OF THE
AMERICAN SOCIETY OF CORPORATE SECRETARIES

NEW YORK CITY
JANUARY 17, 1979

"DISCLOSURE POLICY AND THE PUBLIC INTEREST"

BY: ROBERTA S. KARMEL, COMMISSIONER*
SECURITIES AND EXCHANGE COMMISSION

THE SECURITIES AND EXCHANGE COMMISSION, AS A MATTER OF POLICY, DISCLAIMS RESPONSIBILITY FOR SPEECHES BY ANY OF ITS COMMISSIONERS. THE VIEWS EXPRESSED HEREIN ARE THOSE OF THE SPEAKER AND DO NOT NECESSARILY REFLECT THE VIEWS OF THE COMMISSION.

1.

THE SECURITIES AND EXCHANGE COMMISSION OFTEN IS CLASSIFIED AS A CONSUMER PROTECTION AGENCY, REGULATING THE SECURITIES INDUSTRY AND THE BUSINESS COMMUNITY FOR THE SAKE OF INVESTORS. OUR POPULAR IMAGE PROBABLY IS THAT OF THE WATCHDOG OF WALL STREET, BARKING LOUDLY TO KEEP BOTH THE BULL AND THE BEAR AWAY FROM THE LAMBS. HOWEVER, THE SEC'S MANDATE ALWAYS HAS BEEN MORE SOPHISTICATED AND MORE COMPLICATED THAN SIMPLE CONSUMER PROTECTION. AND, IN TODAY'S MARKETPLACE, INCREASINGLY DOMINATED BY THE INSTITUTIONAL INVESTOR, CONSIDERATION OF THE REAL NEEDS OF INVESTORS FOR PROTECTION BY A GOVERNMENT AGENCY IS A COMPLEX MATTER.

THERE IS AN IMPORTANT INTERRELATIONSHIP BETWEEN INVESTOR CONFIDENCE AND CAPITAL FORMATION WHICH IS AT THE HEART OF THE SEC'S CONCERN FOR INVESTORS. IN ENACTING THE FEDERAL SECURITIES LAWS, CONGRESS ENDEAVORED TO STIMULATE THE INVESTMENT OF CAPITAL IN BUSINESS ENTERPRISE BY PROMOTING THE CONFIDENCE OF INVESTORS IN PUBLICLY HELD CORPORATIONS AND THE SECURITIES MARKETS.

PRESIDENT FRANKLIN D. ROOSEVELT, UPON SIGNING THE SECURITIES EXCHANGE ACT OF 1934 CREATING THE SEC, STATED:

2.

... THE MERCHANDISING OF SECURITIES IS REALLY TRAFFIC IN THE ECONOMIC AND SOCIAL WELFARE OF OUR PEOPLE. SUCH TRAFFIC DEMANDS THE UTMOST GOOD FAITH AND FAIR DEALING ON THE PART OF THOSE ENGAGED IN IT. IF THE COUNTRY IS TO FLOURISH, CAPITAL MUST BE INVESTED IN ENTERPRISE.

BUT THOSE WHO SEEK TO DRAW UPON OTHER PEOPLE'S MONEY MUST BE WHOLLY CANDID REGARDING THE FACTS ON WHICH THE INVESTOR'S JUDGMENT IS BASED.

IN TAKING ACTION PURSUANT TO THE SECURITIES LAWS, THE COMMISSION MUST TAKE INTO ACCOUNT THE PUBLIC INTEREST AS WELL AS INVESTOR PROTECTION. INDEED, INVESTOR PROTECTION WAS DEEMED IMPORTANT ENOUGH TO WARRANT SPECIAL FEDERAL PROTECTION ONLY BECAUSE IT IS IN THE GENERAL PUBLIC INTEREST FOR INVESTORS TO PUT PRIVATE CAPITAL TO WORK IN THE ECONOMY THROUGH THE VEHICLE OF SECURITIES PURCHASES.

I WORRY ABOUT THE SEC'S FUNCTIONS EVERY DAY BECAUSE I AM A REGULATOR. MOST OF YOU IN THIS AUDIENCE WORRY ABOUT THE SEC'S FUNCTIONS MORE THAN YOU MIGHT CHOOSE TO DO BECAUSE YOU ARE AMONG THE REGULATED. IT IS ALL TOO EASY TO BECOME PREOCCUPIED WITH THE DETAILS OF CURRENT REGULATIONS AND FAIL TO CONNECT THOSE REGULATIONS TO THE FUNDAMENTAL PURPOSES OF THE SECURITIES LAWS. IT SEEMS TO ME THAT THE REGULATORY SCHEME WHICH THE SEC ADMINISTERS MUST BE TESTED BY HOW WELL IT SERVES BOTH THE NATION'S CAPITAL NEEDS AND THE PROTECTION OF INVESTORS. THE POINT AND PURPOSE OF SECURITIES REGULATION SHOULD BE TO ENCOURAGE, AND NOT TO DISCOURAGE, THE SUPPLY OF PRIVATE CAPITAL INTO THE PRIVATE SECTOR OF THE ECONOMY.

WITH THIS GENERAL PHILOSOPHICAL PREDICATE IN MIND, I WOULD LIKE TO TURN TO THE SUBJECT OF CORPORATE DISCLOSURE, AND IN PARTICULAR, TO EXAMINE THE BASIS FOR A GOVERNMENT MANDATED DISCLOSURE SYSTEM FOR PUBLIC CORPORATIONS. MOST OF US TAKE SUCH A REGULATORY SYSTEM FOR GRANTED AND RARELY, IF EVER, QUESTION ITS PURPOSE OR VALUE. HOWEVER, IT SEEMS TO ME THAT SUCH A FUNDAMENTAL FEATURE OF SECURITIES REGULATION SHOULD BE QUESTIONED AND JUSTIFIED, IF ONLY TO ASSURE THAT THE COMMISSION'S ONGOING RULEMAKING AND ENFORCEMENT INITIATIVES ARE APPROPRIATELY RELATED TO THE PUBLIC INTEREST WHICH THE SEC WAS DESIGNED TO PROTECT.

THE REGULATION OF BUSINESS BY INDEPENDENT FEDERAL REGULATORY AGENCIES HAS BEEN COMING UNDER INCREASINGLY CRITICAL SCRUTINY. THE AMERICAN BAR ASSOCIATION, IN 1976, APPOINTED A DISTINGUISHED AND EXPERIENCED GROUP OF LAWYERS AND ECONOMISTS AS THE COMMISSION ON LAW AND THE ECONOMY TO EXAMINE AND REPORT ON THE GROWTH AND OPERATION OF FEDERAL REGULATORY AGENCIES. IN AN EXPOSURE DRAFT PUBLISHED BY THAT COMMISSION IN AUGUST OF 1978, THE COMMISSION ACCEPTS THE FACT OF GOVERNMENT INTERVENTION AND ACKNOWLEDGES THAT IT IS JUSTIFIED WHEN THE INCENTIVES OF THE FREE MARKET SYSTEM DO NOT BRING ABOUT DESIRABLE ECONOMIC OR SOCIAL OBJECTIVES. 1/ NEVERTHELESS, THE ABA COMMISSION POINTS OUT THAT --

1/ "FEDERAL REGULATION: ROAD TO REFORM," REPORT BY COMMISSION ON LAW AND THE ECONOMY, AMERICAN BAR ASSOCIATION (EXPOSURE DRAFT, AUGUST 5, 1978) (THE "ABA REPORT").

THE UNPRECEDENTED GROWTH OF GOVERNMENT INTERVENTION OVER THE PAST TWO DECADES ... TOGETHER WITH THE HALTING PACE OF CAPITAL INVESTMENT AND PRODUCTIVITY WHICH MANY LINK TO THIS INTERVENTION, HAS BROUGHT WITH IT A COMPELLING NEED FOR A CRITICAL REEXAMINATION OF OUR REGULATORY SYSTEM. ^{2/}

IN MAKING SUCH A CRITICAL REEXAMINATION, THE ABA COMMISSION STATES A PREFERENCE FOR CERTAIN REGULATORY DEVICES OVER OTHERS. ONE OF THE PREFERRED DEVICES IS DISCLOSURE, AS CONTRASTED, FOR EXAMPLE, TO STANDARD SETTING. THE PURPOSE OF DISCLOSURE IS TO ENABLE BUYERS TO MAKE BETTER OR MORE INFORMED CHOICES. THE IMPORTANT DIFFERENCE BETWEEN DISCLOSURE STANDARDS AND REGULATORY STANDARDS GOVERNING CONDUCT IS THAT WHEN --

... STANDARDS FORBID OR DICTATE THE TYPE OF PRODUCT WHICH MUST BE SOLD, ... THEY INTERFERE WITH CONSUMER CHOICE AND IMPEDE PRODUCER FLEXIBILITY. STANDARDS GOVERNING DISCLOSURE DO NOT DETERMINE CONDUCT, ... ^{1/} THE FREEDOM OF ACTION THAT DISCLOSURE REGULATION ALLOWS VASTLY REDUCES THE COST OF MISTAKES. A MISTAKEN OR OVERLY BROAD DISCLOSURE REGULATION MEANS ONLY THAT TOO MUCH, OR THE WRONG, INFORMATION HAS BEEN CALLED FOR. IT DOES NOT STOP BUYERS FROM OBTAINING PRODUCTS OR PRODUCERS FROM MAKING THEM. ^{3/}

AS A COMMISSIONER OF THE SEC, I APPRECIATE THIS LAUDATORY ANALYSIS OF THE PRIMARY REGULATORY TECHNIQUE UTILIZED BY MY AGENCY. HOWEVER, I WOULD NOT WANT SELF-CONGRATULATION TO CUT OFF MY FURTHER INQUIRY INTO THE DRAWBACKS AND LIMITATIONS OF DISCLOSURE AS A REGULATORY METHOD.

^{2/} Id. AT 8.

^{3/} Id. AT 60.

DURING THE COURSE OF THE PAST FEW YEARS, THE SEC'S DISCLOSURE SYSTEM WAS STUDIED AND RE-EVALUATED BY THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION, A DISTINGUISHED PANEL OF EXPERTS WHICH INCLUDED HAROLD M. WILLIAMS, NOW CHAIRMAN OF THE SEC. THE COMMITTEE'S REPORT TO THE SEC OF NOVEMBER 3, 1977 CONCLUDED THAT "THE DISCLOSURE SYSTEM ESTABLISHED BY THE CONGRESS IN THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934, AS IMPLEMENTED AND DEVELOPED BY THE SECURITIES AND EXCHANGE COMMISSION SINCE ITS CREATION IN 1934, IS SOUND AND DOES NOT NEED RADICAL REFORM OR RENOVATION." 4/ NOT ALL MEMBERS OF THE COMMITTEE AGREED WITH THIS CONCLUSION. MOREOVER, THE COMMITTEE DID SUGGEST SIGNIFICANT CHANGES IN THE COMMISSION'S PROCEDURES, RULES, EMPHASES AND APPROACHES TO DISCLOSURE PROBLEMS.

ONE OF THE DISSIDENTERS FROM THE ADVISORY COMMITTEE'S CONCLUSIONS WAS PROFESSOR HOMER KRIPKE WHO FELT THAT THE COMMITTEE HAD FAILED TO ADEQUATELY CONSIDER "THE USEFULNESS OF CONTINUOUS MAINTENANCE AND ENLARGEMENT OF THE DETAIL OF THE MANDATED DISCLOSURE SYSTEM, ESPECIALLY FOR ESTABLISHED COMPANIES." 5/ IN PROFESSOR KRIPKE'S VIEW, THE SEC TAXES ISSUERS THE COSTS OF DISCLOSURE FOR THE BENEFIT OF SECURITY ANALYSTS AND THE PUBLIC, AND THE COSTS AND BENEFITS OF THE DISCLOSURE SYSTEM SHOULD BE ANALYZED MORE FULLY AT THIS TIME.

4/ REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION, SUBMITTED TO THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, U.S. HOUSE OF REPRESENTATIVES, 95TH CONG., 1ST SESS., 95-29 (Nov. 3, 1977), (THE "ADVISORY COMMITTEE REPORT").

5/ Id. AT D-55.

IN A VERY INTERESTING RECENT ANALYSIS OF MANDATED CORPORATE DISCLOSURE BY MAUTZ & MAY, "FINANCIAL DISCLOSURE IN A COMPETITIVE ECONOMY," 6/ AN EFFORT WAS MADE TO BALANCE THE COSTS AGAINST THE BENEFITS OF DISCLOSURE. THE AUTHORS POINT OUT THAT ALTHOUGH FINANCIAL DISCLOSURE IS ESSENTIAL TO THE FUNCTIONING OF A FREE ENTERPRISE ECONOMY, FINANCIAL DISCLOSURE HAS BOTH ADVANTAGES AND DISADVANTAGES. IN ADDITION TO THE DIRECT AND INDIRECT COSTS OF OBTAINING AND DISSEMINATING INFORMATION REQUIRED TO BE DISCLOSED, DISCLOSURE MAY HAVE AN ADVERSE EFFECT UPON COMPETITION AND IT MAY DISCOURAGE INNOVATION AND RISK TAKING.

A TOTAL ECONOMY POINT OF VIEW WOULD REQUIRE FINANCIAL DISCLOSURE ADEQUATE TO ENCOURAGE CAPITAL FORMATION AND TO PROVIDE EFFICIENT RESOURCE ALLOCATION, BUT NOT SO EXCESSIVE AS TO DISCOURAGE EITHER INNOVATION OR RISK TAKING AMONG COMPETING COMPANIES. HOWEVER, A VARIETY OF PARTICIPANTS IN THE SECURITIES MARKETS HAVE AN INTEREST IN FINANCIAL DISCLOSURE. FOR EXAMPLE, AN INDIVIDUAL INVESTOR WOULD PREFER DISCLOSURE THAT IS ADEQUATE TO PERMIT HIM TO MAKE THE BEST PERSONAL INVESTMENT DECISIONS POSSIBLE. HE IS UNLIKELY TO CARE ABOUT ADEQUATE COMPETITION OR EFFICIENT RESOURCE ALLOCATION. UNDER THE ANALYSIS MADE BY MAUTZ & MAY, THE SEC IS NECESSARILY ON THE SIDE OF INCREASED FINANCIAL DISCLOSURE BECAUSE OF A NATURAL TENDENCY ON THE PART OF REGULATORY COMMISSIONS AND THEIR STAFFS TO SEEK AND SERVE THE

6/ R.K. MAUTZ AND WILLIAM G. MAY, "FINANCIAL DISCLOSURE IN A COMPETITIVE ECONOMY," A RESEARCH STUDY AND REPORT PREPARED FOR THE FINANCIAL EXECUTIVES RESEARCH FOUNDATION (1978).

CONSTITUENCY MOST LIKELY TO BE BENEFITED BY THE REGULATORY EFFORT AND THEREFORE SUPPORT IT,

I BELIEVE THAT THE CAUTIONS OF MAUTZ & MAY CONCERNING "OVERDISCLOSURE" ARE WORTH HEEDING. ONE REASON I THINK SO IS THAT THE AUTHORS APPRECIATE THE POSITIVE VALUES OF DISCLOSURE, AND, INDEED, PROVIDE US WITH AN EXCELLENT RATIONALE FOR A CORPORATE DISCLOSURE SYSTEM. THEY STATE:

BECAUSE THE SECURITIES MARKET IS OUR PRIMARY MECHANISM FOR ALLOCATING SCARCE RESOURCES AMONG COMPETING COMPANIES, THAT MARKET SYSTEM HAS GREAT IMPORTANCE TO THE WELFARE OF THE ECONOMY AND ITS PEOPLE. ONLY AS IT FUNCTIONS OPENLY AND ON A COMPETITIVE BASIS WILL THOSE COMPANIES WHOSE PRODUCTS ARE MOST FAVORED BY CONSUMERS HAVE THE BEST OPPORTUNITIES FOR MORE CAPITAL. THUS, THE SECURITIES MARKET EXISTS NOT SOLELY FOR THE CONVENIENCE OF INVESTORS, BUT ALSO AS AN INSTRUMENT ACCEPTED AND ENCOURAGED BY SOCIETY TO PERFORM AN ESSENTIAL FUNCTION WHICH SOCIETY AS YET HAS FOUND NO BETTER WAY TO PERFORM. 77

THE AUTHORS DRAW TWO CONCLUSIONS FROM THIS ASSERTION. ONE IS THAT THE SOCIAL ROLE OF THE SECURITIES MARKET IS MORE IMPORTANT THAN ANY SINGLE GROUP OPERATING WITHIN THE MARKET -- WHETHER INVESTORS, COMPANIES RAISING CAPITAL OR THE VARIOUS PROFESSIONAL GROUPS ESSENTIAL TO THE FUNCTIONING OF THE MARKET. SECOND, THE QUALITY OF THE SECURITIES MARKET, AND ESPECIALLY THE INFORMATION AVAILABLE IN THE MARKET, IS CRUCIAL TO THE ACHIEVEMENT OF SOCIETY'S GOALS. --

77 Id. AT 79.

THEY GO ON:

UNLESS THE SECURITIES MARKET FUNCTIONS IN AN OPEN AND INFORMED BASIS UNINHIBITED BY DECEIT, LACK OF INFORMATION, AND IGNORANCE OF THE PROPER USE OF THE INFORMATION AVAILABLE, OUR CHOSEN MEANS OF CAPITAL ALLOCATION IS UNLIKELY TO PERFORM AS DESIRED. 8/

IT IS INTERESTING TO ME, AS A REGULATOR, THAT DESPITE THEIR ELOQUENT DEFENSE OF DISCLOSURE AS ESSENTIAL TO THE EFFICIENT OPERATION OF THE SECURITIES MARKET, MAUTZ & MAY DO NOT BELIEVE THAT A GOVERNMENT MANDATED DISCLOSURE SYSTEM IS NECESSARY. THEY POINT OUT THAT REGULATION IMPLIES A LACK OF FAITH IN THE MARKET SYSTEM, AND OUR PRESENT GOVERNMENT MANDATED DISCLOSURE SYSTEM IS THE RESULT OF THE INSUFFICIENT AND UNRELIABLE INFORMATION AVAILABLE TO INVESTORS IN THE 1920'S. THE AUTHORS ARGUE THAT TODAY THE MARKET IS DOMINATED BY INSTITUTIONAL INVESTORS WHO ARE SERVED BY SOPHISTICATED AND WARY FINANCIAL ANALYSTS. ACCORDINGLY, FINANCIAL DISCLOSURE IS NO LONGER DEPENDENT ON LEGAL REQUIREMENTS.

THIS IS A VERY CHALLENGING THEORY, ESPECIALLY IN LIGHT OF THE RATIONALE BY THE ABA COMMISSION, TO WHICH I REFERRED EARLIER, FOR SEC DISCLOSURE REQUIREMENTS. THE ABA COMMISSION ASSERTED THAT GOVERNMENT DISCLOSURE REGULATION IS DESIGNED TO COMPENSATE FOR INADEQUATE INFORMATION OR TO LOWER THE COST TO THE CONSUMER OF OBTAINING ADEQUATE INFORMATION IN CERTAIN SITUATIONS. ONE OF THESE SITUATIONS TO WHICH SEC REGULATIONS ARE APPLICABLE, IS WHERE THE MARKET ON THE SUPPLY SIDE FAILS TO FURNISH THE INFORMATION NEEDED OR DEMANDED.

8/ Id. AT 80.

THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SEC, TO WHICH I ALSO REFERRED EARLIER, AGREED WITH THE BASIC PREMISE OF MAUTZ & MAY THAT "RELIABLE AND TIMELY INFORMATION SUFFICIENT TO THE NEEDS OF THOSE WHO HAVE THE RESPONSIBILITY FOR THE ALLOCATION OF INVESTMENT (CAPITAL) RESOURCES IS ESSENTIAL TO THE EFFICIENT ALLOCATION OF RESOURCES IN ANY ECONOMY." HOWEVER, THE ADVISORY COMMITTEE ASSERTED ITS BELIEF THAT "MARKET FORCES AND SELF-INTEREST CANNOT BE RELIED UPON TO ASSURE A SUFFICIENT FLOW OF TIMELY AND RELIABLE INFORMATION," AND THEREFORE THE SEC SHOULD CONTINUE TO MANDATE THE SUPPLY OF SUCH INFORMATION TO INVESTORS. ^{9/}

IN ELABORATING ON THIS CONCLUSION, THE ADVISORY COMMITTEE ARGUES THAT A CORPORATE DISCLOSURE "SYSTEM SHOULD HAVE A MANDATORY COMPONENT IN ORDER TO PROVIDE UNIFORM DISCLOSURE, TO ASSURE DISCLOSURE OF INFORMATION VIEWED AS ADVERSE TO MANAGEMENT'S PERCEPTION OF ITS OWN OR THE FIRM'S BEST INTEREST, TO PROVIDE A STANDARD AGAINST WHICH DEFICIENT DISCLOSURE CAN BE TESTED AND TO ESTABLISH A MECHANISM FOR ENFORCEMENT." ^{10/}

NOW YOU MAY BE WONDERING WHY I HAVE GONE TO SUCH GREAT LENGTHS TO RAISE A FUNDAMENTAL QUESTION ABOUT THE VALUE OF A GOVERNMENT MANDATED DISCLOSURE SYSTEM, WHICH THE ADVISORY COMMITTEE ACCEPTED AND DEFENDED SO UNQUESTIONINGLY. YOU MAY FIND THIS PARTICULARLY CURIOUS SINCE MY ENTIRE

^{9/} THE ADVISORY COMMITTEE REPORT AT II.
^{10/} Id. AT 305-306.

PROFESSIONAL CAREER, BOTH AS A PUBLIC OFFICIAL AND AS A PRIVATE SECURITIES LAWYER, HAS BEEN DEVOTED TO THE CORPORATE DISCLOSURE GAME. I AM RAISING THIS QUESTION, HOWEVER, BECAUSE I BELIEVE THAT THOSE WHO ATTACK AND THOSE WHO DEFEND A GOVERNMENT MANDATED DISCLOSURE SYSTEM ARE DOING SO ON FAITH; THERE IS LITTLE EMPIRICAL EVIDENCE TO PROVE WHO IS RIGHT. THIS IS NOT NECESSARILY BAD, SINCE MANY OF OUR COUNTRY'S POLITICAL AND ECONOMIC INSTITUTIONS ARE BUILT ON POLITICAL PERSUASION.

HOWEVER, AS A COMMISSIONER OF THE SEC, I DO NOT BELIEVE THAT I CAN BLINDLY ACCEPT THE PROPOSITION THAT A GOVERNMENT MANDATED DISCLOSURE SYSTEM IS NECESSARILY WHOLLY GOOD OR THAT ALL OF THE DISCLOSURE REGULATIONS PRODUCED BY THE SEC DURING THE PAST 45 YEARS ARE CURRENTLY IN THE PUBLIC INTEREST. I FEEL THIS WAY FOR AT LEAST THREE REASONS: FIRST, THE IDEAS OF THOSE COMMENTATORS WHO ARGUE THAT THE QUANTITY AND QUALITY OF DISCLOSURE SHOULD BE DETERMINED BY THE MARKETPLACE ARE AT LEAST THEORETICALLY PERSUASIVE, AND HAVE NOT BEEN TESTED IN RECENT YEARS IN OUR CORPORATE SECURITIES MARKETS. THE MARKETPLACE HAS GENERALLY DETERMINED THE NATURE OF DISCLOSURE FOR MUNICIPAL SECURITIES, WITH MIXED RESULTS. HOWEVER, THE GREAT FRAUDS OF THE PAST DECADE HAVE NOT BEEN LIMITED TO ANY PARTICULAR TYPE OF SECURITIES. ALSO, ALTHOUGH THESE DAYS IT IS POPULAR TO PAY LIP SERVICE TO BALANCING THE COSTS OF DISCLOSURE AGAINST ITS BENEFITS, WE DO NOT KNOW WHAT THE COSTS ARE, OR THE EXTENT TO WHICH THE COSTS KEEP CORPORATIONS FROM COMING TO THE PUBLIC CAPITAL MARKETS.

SECOND, ALTHOUGH UNIFORMITY OF DISCLOSURE IS A SHIBBOLETH TO WHICH MOST OF US PAY HOMAGE, SO IS FREEDOM OF EXPRESSION. AND THE U.S. SUPREME COURT HAS RECENTLY TOLD US THAT THE FIRST AMENDMENT EXTENDS TO BOTH CORPORATIONS AND COMMERCIAL SPEECH, AT LEAST IN A LIMITED WAY.

FINALLY, AND PERHAPS MOST IMPORTANTLY, I BELIEVE THAT A SKEPTICAL ATTITUDE TOWARD GOVERNMENT MANDATED DISCLOSURE IS THE BEST ANTIDOTE FOR UNWARRANTED EXTENSIONS OF DISCLOSURE POLICY INTO AREAS BEYOND REASONABLE INVESTOR CONCERN, AND THE BEST APPROACH TO REFORM OF OUR PRESENT CORPORATE DISCLOSURE REQUIREMENTS, TO THE EXTENT REFORM IS NEEDED. I STATED A FEW MOMENTS AGO THAT WE HAVE NOT EXPERIMENTED WITH ALLOWING THE MARKETPLACE, AFTER 45 YEARS OF GOVERNMENT MANDATED DISCLOSURE, TO DICTATE WHAT AND HOW MUCH CORPORATE DISCLOSURE IS NECESSARY AND APPROPRIATE. HOWEVER, I HOPE THAT SUCH EXPERIMENTS WILL BE ATTEMPTED IN THE FUTURE, AT LEAST WITHIN LIMITED AREAS.

ONE AREA IN WHICH THE COMMISSION HAS EXPERIMENTED WITH LESS DISCLOSURE IS IN ITS RECENT REVISION OF FORM S-16 PERMITTING PRIMARY OFFERINGS BY SEASONED COMPANIES TO BE MADE ON THIS SHORT FORM. SINCE THE FORM REQUIRES NO DESCRIPTION, FOR EXAMPLE, OF BUSINESS, CORPORATIONS ARE FREE TO INCLUDE SUCH INFORMATION OR MERELY INCORPORATE PRIOR DISCLOSURE DOCUMENTS BY REFERENCE. ACCORDINGLY, THE EXPANDED S-16 CAN BE VIEWED AS AN ATTEMPT TO LET THE MARKETPLACE DETERMINE THE QUANTITY OF DISCLOSURE INFORMATION NECESSARY FOR CERTAIN TYPES OF OFFERINGS. ANOTHER AREA WHERE THE COMMISSION HAS

BEEN ENCOURAGING ISSUERS TO MAKE SUCH DISCLOSURE AS THEY MAY DEEM APPROPRIATE, BUT NOT NECESSARILY IN A FORM DICTATED BY THE SEC, IS PROJECTIONS. IT SEEMS TO ME THAT DISCLOSURE OF OTHER SOFT, FORWARD-LOOKING INFORMATION COULD BE SIMILARLY ENCOURAGED BUT NOT REQUIRED. ON THE OTHER HAND, LESS STAFF REVIEW AND COMMENT ON DISCLOSURE DOCUMENTS FILED BY ESTABLISHED COMPANIES MIGHT LEAD TO MORE CREATIVITY AND INNOVATION IN CORPORATE DISCLOSURE, WITHOUT SACRIFICING INVESTOR PROTECTION.

I BELIEVE THAT MORE RESPONSIBILITY FOR THE TIMING AND CONTENT OF DISCLOSURE SHOULD BE PLACED ON THE CORPORATE COMMUNITY, RATHER THAN ON THE GOVERNMENT. ONE OF THE REASONS I FEEL THIS WAY IS THAT OUR SOCIETY HAS ALWAYS PUT A GREAT PREMIUM UPON FREEDOM OF SPEECH, NOT ONLY FOR THE SAKE OF INDIVIDUAL FREEDOM, BUT ALSO FOR THE SAKE OF SOCIETY'S INTEREST IN ENCOURAGING THE FREE EXCHANGE OF IDEAS AND THE FREE FLOW OF INFORMATION.

ALTHOUGH FREEDOM OF SPEECH IS A CRUCIAL CONSTITUTIONAL RIGHT, THE PROTECTIONS AFFORDED COMMERCIAL SPEECH UNDER THE FIRST AMENDMENT HAVE ONLY BEEN GIVEN SERIOUS ATTENTION RECENTLY. IN BATES V. STATE BAR OF ARIZONA, 11/ THE U.S. SUPREME COURT EXPLAINED THAT SUCH SPEECH IS PROTECTED AS MUCH FOR THE SAKE OF THE LISTENER AS THE SPEAKER. "/COMMERCIAL SPEECH SERVES TO INFORM THE PUBLIC OF THE AVAILABILITY, NATURE AND PRICES OF PRODUCTS AND SERVICES, 11/ 433 U.S. 350 (1977)

AND THUS PERFORMS AN INDISPENSABLE ROLE IN THE ALLOCATION OF RESOURCES IN A FREE ENTERPRISE SYSTEM." ^{12/}

FURTHER, THE EVERYDAY NEEDS OF THE INDIVIDUAL AND SOCIETY FOR THE FREE FLOW OF COMMERCIAL SPEECH MAY BE AS KEEN AS THE NEEDS FOR POLITICAL DIALOGUE.

THE DISCLOSURES MADE IN SEC DISCLOSURE DOCUMENTS IS COMMERCIAL SPEECH. AND IN FIRST NATIONAL BANK OF BOSTON V. BILLOTTI, ^{13/} THE SUPREME COURT HELD THAT THE FIRST AMENDMENT DOES EXTEND TO CORPORATE ACTION, IF ONLY IN ORDER TO PROTECT THE RIGHTS OF INDIVIDUALS WHO ARE CORPORATE OFFICERS, DIRECTORS OR EMPLOYEES. THIS DOES NOT MEAN, HOWEVER, THAT THE FEDERAL SECURITIES LAWS HAVE BEEN RENDERED UNCONSTITUTIONAL BY REASON OF RECENT INTERPRETATIONS OF THE FIRST AMENDMENT.

RESTRICTIONS ON TRADITIONAL FORMS OF POLITICAL SPEECH MAY BE JUSTIFIED ONLY BY A SHOWING OF COMPELLING STATE INTEREST. IN THE CASE OF COMMERCIAL SPEECH, HOWEVER, REGULATION MAY BE JUSTIFIED BY A BALANCING OF THE GOVERNMENTAL INTEREST SERVED AGAINST THE VALUE OF SPEECH AND THE BURDENS PLACED UPON THE SPEAKER. IN THE BATES CASE, THE COURT INDICATED THAT COMMERCIAL SPEECH WHICH IS FALSE, DECEPTIVE, OR MISLEADING IS SUBJECT TO RESTRAINT. "INDEED, THE PUBLIC AND PRIVATE BENEFITS FROM COMMERCIAL SPEECH DERIVE FROM CONFIDENCE IN ITS ACCURACY AND RELIABILITY. THUS, THE LEEWAY FOR UNTRUTHFUL OR MISLEADING EXPRESSION THAT HAS BEEN ALLOWED IN OTHER CONTEXTS HAS LITTLE FORCE IN THE COMMERCIAL ARENA." ^{14/}

^{12/} Id. AT 364

^{13/} 435 U.S. 765 (1978).

^{14/} BATES V. STATE BAR OF ARIZONA, 433 U.S. 350, 383 (1977).

THE SECURITIES LAWS ARE BASED ON THE PRINCIPLE THAT WHEN CORPORATIONS SELL THEIR SHARES TO THE PUBLIC THEY MUST MAKE ACCURATE AND COMPLETE DISCLOSURE OF THEIR BUSINESS AND AFFAIRS, AND MUST THEN CONTINUE TO MAKE SUCH DISCLOSURE. THE SUPREME COURT HAS NOT YET HAD OCCASION TO DECIDE A CASE DIRECTLY CONCERNING THE RELATIONSHIP BETWEEN THE FIRST AMENDMENT AND THE DISCLOSURE REQUIREMENTS OF THE FEDERAL SECURITIES LAWS. IF AND WHEN THE COURT DOES SO, IT PRESUMABLY WILL BALANCE THE FREEDOM OF SPEECH OF ISSUERS AGAINST THE GOVERNMENTAL INTEREST TO BE SERVED BY REGULATING HOW THEY EXPRESS MATERIAL FACTS ABOUT THEIR AFFAIRS. THE COURT HAS CITED AS EXAMPLES OF COMMUNICATIONS THAT ARE REGULATED WITHOUT OFFENDING THE FIRST AMENDMENT THE EXCHANGE OF INFORMATION ABOUT SECURITIES AND CORPORATE PROXY STATEMENTS. ^{15/}

ONE OF THE GOVERNMENT'S INTERESTS IN REGULATING CORPORATE DISCLOSURES IS TO ASSURE UNIFORMITY. ANOTHER INTEREST IS TO PREVENT AND SUPPRESS FRAUD. IN ADDITION, A GOVERNMENT INTEREST IN PROMULGATING CORPORATE DISCLOSURE REQUIREMENTS IS TO ENCOURAGE CAPITAL FORMATION. THEREFORE, IN BALANCING THE FREEDOM OF CORPORATIONS TO DRAFT DISCLOSURE DOCUMENTS AGAINST THE PUBLIC'S INTEREST IN OBTAINING TRUTHFUL INFORMATION, CONSIDERATION SHOULD BE GIVEN TO WHAT EFFECT THE COMMISSION'S DISCLOSURE REQUIREMENTS HAVE ON CAPITAL INVESTMENT. IT

^{15/} OHLEBK V. OHIO STATE BAR ASSOCIATION, 436 U.S. 447, 456 (1978).

WOULD NOT BE APPROPRIATE FOR THE COURTS TO VIEW THE PUBLIC POLICY INTERESTS TO BE BALANCED SOLELY IN TERMS OF CONSUMER PROTECTION FROM FALSE OR MISLEADING ADVERTISING. FURTHER, IN FORMULATING DISCLOSURE POLICY WITHIN THE LIMITATIONS IMPOSED BY THE FIRST AMENDMENT THE SEC SHOULD LIKEWISE CONSIDER THE PUBLIC INTEREST IN CAPITAL FORMATION.

THE ADVISORY COMMITTEE URGED THE COMMISSION TO MAKE VARIOUS CHANGES IN ITS PROCEDURES, RULES, EMPHASES AND APPROACHES TO DISCLOSURE PROBLEMS. SOME OF THESE CHANGES HAVE BEEN ADOPTED IN THE PAST YEAR; MORE OF THESE CHANGES MAY BE ADOPTED IN THE FUTURE. LET ME REVIEW CERTAIN ACTIONS ALREADY TAKEN BY THE COMMISSION IN RESPONSE TO THE COMMITTEE'S RECOMMENDATIONS. WITH RESPECT TO THE RECOMMENDATION THAT DISCLOSURE REQUIREMENTS BE UNIFORM AMONG FORMS AND REPORTS, THE COMMISSION HAS ADOPTED THE FIRST SIX ITEMS OF REGULATION S-K. THIS REGULATION IS INTENDED TO MAKE COMPLIANCE WITH DISCLOSURE REQUIREMENTS SIMPLER BY PROVIDING ONE CONVENIENT REFERENCE SOURCE AND ASSURING THAT INFORMATION REQUIRED TO BE DISCLOSED DOES NOT GENERALLY VARY FROM FORM TO FORM. IN A RELATED MEASURE, ALTHOUGH NOT IN RESPONSE TO THE ADVISORY COMMITTEE, THE COMMISSION ALSO RECENTLY ADOPTED AN INTEGRATED REGISTRATION AND REPORTING SYSTEM FOR INVESTMENT COMPANIES UNDER THE SECURITIES ACT AND THE INVESTMENT COMPANY ACT. WITH RESPECT TO THE FORMAT OF DISCLOSURE, THE COMMISSION HAS PUBLISHED FOR COMMENT AND IS PRESENTLY CONSIDERING THE ADVISORY COMMITTEE'S PROPOSED NEW FORM 10-K FOR ANNUAL REPORTING BY REGISTERED COMPANIES.

IN ADDITION, THE COMMISSION IS CONTINUING ITS EFFORTS, AS URGED BY THE ADVISORY COMMITTEE, TO INTEGRATE THE DISCLOSURE REQUIREMENTS OF THE SECURITIES ACT AND THE EXCHANGE ACT. IN PARTICULAR, IT HAS EXPANDED THE USE OF THE S-16 WHICH I MENTIONED EARLIER AS AN EXAMPLE OF DEREGULATION OF CORPORATE DISCLOSURE.

THE S-16 IS BASED ON THE IDEA THAT A CONTINUOUS DISCLOSURE SYSTEM ELIMINATES THE NEED FOR DUPLICATION. THEREFORE, THE S-16 INCORPORATES BY REFERENCE CURRENT INFORMATION ABOUT A COMPANY ALREADY ON FILE WITH THE SEC. THE S-16 IS NOW AVAILABLE TO CERTAIN ISSUERS FOR REGISTRATION OF SECURITIES OFFERED DIRECTLY TO THE PUBLIC IN PRIMARY OFFERINGS, AND THE COMMISSION IS CONSIDERING EXPANDING ITS USE FURTHER.

OTHER ACTIONS RESPONSIVE TO THE COMMITTEE'S RECOMMENDATIONS INCLUDE A RELEASE ANNOUNCING THE COMMISSION'S INTENT TO DEVELOP DISCLOSURE GUIDES FOR PARTICULAR INDUSTRIES, AND A RELEASE CONCERNING A RULE TO PERMIT AND ENCOURAGE THE VOLUNTARY DISCLOSURE OF PROJECTIONS AND OTHER FORWARD LOOKING INFORMATION.

OF PARTICULAR NOTE IS THAT ONE MONTH AFTER THE ADVISORY COMMITTEE'S REPORT WAS SUBMITTED, THE COMMISSION ANNOUNCED A THOROUGH REVIEW OF THE EFFECT OF ITS RULES ON THE ABILITY OF SMALL BUSINESS TO RAISE CAPITAL AND OF THE IMPACT GENERALLY ON SMALL BUSINESS OF THE DISCLOSURE REQUIREMENTS. IN THIS REGARD, SIMPLIFIED REGISTRATION AND REPORTING REQUIREMENTS

ON FORM S-18 WERE PROPOSED FOR SMALL BUSINESSES. SMALL BUSINESS HEARINGS HAVE BEEN HELD AROUND THE COUNTRY. BASED ON THE COMMENTS RECEIVED DURING THE COURSE OF THE HEARINGS, AND OTHER INFORMATION, THE COMMISSION RECENTLY ENACTED REVISIONS TO RULE 144, RULE 146, AND REGULATION A WHICH SHOULD MAKE THOSE REQUIREMENTS IN THE SALE OF SECURITIES LESS STRINGENT. MOREOVER, I UNDERSTAND THAT THE STAFF'S RECOMMENDATIONS WITH RESPECT TO FORM S-18 WILL BE SUBMITTED TO THE COMMISSION IN THE NEAR FUTURE.

I DO NOT MEAN TO SUGGEST THAT ALL OF THE INITIATIVES TAKEN BY THE SEC IN RESPONSE TO THE ADVISORY COMMITTEE'S RECOMMENDATIONS LESSEN REGULATORY BURDENS OR ARE BASED ON AN EFFORT TO LIMIT THE EXTENT OF GOVERNMENT MANDATED DISCLOSURE. HOWEVER, THE SCRUTINY OF THE COMMISSION'S DISCLOSURE POLICIES STARTED BY THE ADVISORY COMMITTEE IS NOW ONGOING. I BELIEVE THAT THIS INQUIRY IS HEALTHY AND IN THE PUBLIC INTEREST. WHAT IS IMPORTANT IS FOR BOTH REGULATORS AND THE REGULATED TO HAVE OPEN MINDS AND FLEXIBLE ATTITUDES TOWARD CORPORATE DISCLOSURE.

MY OWN PERSONAL AGENDA OF MATTERS FOR REFORM WOULD INCLUDE THE FURTHER INTEGRATION OF THE 1933 AND 1934 ACTS; THE ESTABLISHMENT OF LESS ONEROUS DISCLOSURE STANDARDS FOR SMALL BUSINESSES; AND THE HARMONIZATION OF U S. AND FOREIGN DISCLOSURE POLICIES. IN ADDITION, I AM CONCERNED

ABOUT HOW DISCLOSURE POLICY IS AND SHOULD BE MADE BY MY AGENCY, AND I BELIEVE THAT THE IMPLEMENTATION AND ENFORCEMENT OF DISCLOSURE POLICY WARRANTS CONSTANT CRITICAL REVIEW. IN THIS CONNECTION, IT IS IMPORTANT FOR THE COMMISSION TO MAINTAIN A PROPER BALANCE BETWEEN THE FORMULATION OF DISCLOSURE POLICY IN ENFORCEMENT CASES AND THE FORMULATION OF DISCLOSURE POLICY THROUGH THE COMMENT PROCESS AND THE ISSUANCE OF GENERAL INTERPRETATIVE RELEASES.

THE BUSINESS OF THE CONGRESS IS TO LEGISLATE AND THE BUSINESS OF INDEPENDENT AGENCIES IS TO REGULATE. THE TREND OF THE PAST FOUR DECADES HAS BEEN EVER INCREASING GOVERNMENT REGULATION OF BUSINESS. BUT IN VIEW OF THE EVIDENCE THAT THERE HAS BEEN AND CONTINUES TO BE INSUFFICIENT CAPITAL INVESTMENT IN THE ECONOMY, I DO NOT BELIEVE WE CAN ASSUME THAT INCREASING THE AMOUNT OF SEC DISCLOSURE BY PUBLIC COMPANIES IS USEFUL OR IN THE PUBLIC INTEREST. RATHER, I BELIEVE IT IS INCUMBENT UPON THE COMMISSION, AS IT PROCEEDS TO REVIEW AND GO BEYOND THE RECOMMENDATIONS OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE, TO BE MINDFUL OF THE BURDENS AS WELL AS THE BENEFITS OF DISCLOSURE REGULATIONS. WE MUST REMEMBER THAT THE INVESTORS WHICH THE COMMISSION PROTECTS -- AS WELL AS THE GENERAL PUBLIC -- PAY THE COSTS OF GREATER REGULATION OF ISSUERS.